LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 30 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1018

ROBERT G. GORDON,
PETITIONER,

v.

SHEPARD A. SPUNT,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GEORGE R. DESMOND
24 Union Avenue
Framingham, Massachusetts
and
HENRY FRIEDMAN
31 Milk Street
Boston, Massachusetts
Attorneys for Petitioner

Blanchard Press, Inc., Boston, Mass. — Law Printers

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	5
Appendix A, Opinion of Court of Appeals	6
Appendix B, Judgment of Court of Appeals	8
Appendix C, Memorandum of Decision of District Court	9
Appendix D, Memorandum and Order of District Court	16
Appendix E, Decree	25

Table of Citations

Cases

Crofoot, Nielsen & Co.; In re, 313 F.2d 170	4
Myron M. Navison Shoe Co., Inc. v. *Lane Shoe Company,* 36 F.2d 454	4

Statutes

11 U.S.C. 41(b)	2, 3, 4, 5
95(b)	2, 4
28 U.S.C. 1254(1)	2

In the
Supreme Court of the United States

OCTOBER TERM, 1969

No.

ROBERT G. GORDON,
PETITIONER,

v.

SHEPARD A SPUNT,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the First Circuit entered on November 10, 1969, in this case which was decided by the Court of Appeals in an opinion rendered November 10, 1969.

Opinions Below

The opinion of the Court of Appeals rendered on November 10, 1969 is not yet reported. It appears as Appendix A to this petition.

The memorandum of the decision of the United States District Court for the District of Massachusetts in Civil Case No. 68-503-M dated December 5, 1968 is not reported and appears as Appendix C.

The memorandum and order of the United States District Court for the District of Massachusetts in Civil Case No. 68-503-M dated March 31, 1969 is not reported and appears as Appendix D.

The final decree in this same case appears as Appendix E.

Jurisdiction

The judgment of the Court of Appeals in this case was entered on November 10, 1969. Jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Is the fraudulent filing of a bankruptcy petition by a single creditor a jurisdictional defect in the bankruptcy proceeding which subjects the bankruptcy proceeding to collateral attack?

Statutes Involved

This case primarily involves Section 59b of the Bankruptcy Act, 11 U.S.C. 95(b) and Section 18(b) of the Bankruptcy Act, 11 U.S.C. 41(b). The provisions of these statutes are as follows:

> *11 U.S.C. 95(b)* Three or more creditors who have provable claims not contingent as to liability against a person, amounting in the aggregate to $500 in excess of the value of any securities held by them, or, if all of the creditors of the person are less than twelve in number, then one or more of the creditors whose

claim or claims equal that amount may file a petition to have him adjudged a bankrupt; but the claim or claims, if unliquidated, shall not be counted in computing the number and the aggregate amount of the claims of the creditors joining in the petition, if the court determines that the claim or claims cannot be readily determined or estimated to be sufficient, together with the claims of the other creditors, to aggregate $500, without unduly delaying the decision upon the adjudication.

11 U.S.C. 41(b) The bankrupt and, in the case of a petition against a partnership, any general partner or, in the case of a petition in behalf of a partnership, any general partner not joining therein, may appear and plead to the petition within five days after the return day or within such further time as the court may allow.

Statement

On August 24, 1967, a single creditor alleging that there were less than twelve creditors filed a bankruptcy petition in the United States District Court for the District of Massachusetts against one McCullough. McCullough was adjudicated a bankrupt in due course, and the Trustee, Spunt, was appointed. The Trustee brought suit under Section 60 of the Bankruptcy Act, 11 U.S.C. 96, against Robert G. Gordon to recover an alleged preference received on April 24, 1967, exactly four months before the filing of the bankruptcy petition.

In the preference action, Gordon filed an answer which attacked Spunt's capacity to bring the action as Trustee in Bankruptcy. The theory of this attack was that the original bankruptcy petition was fatally defective for lack of jurisdiction because the petition was filed by one creditor

who knew the alleged bankrupt had more than twelve creditors.

Gordon also filed a motion to dismiss the complaint for the same reason. The District Court denied the motion to dismiss, and after hearing the case on the merits, rendered judgment against Gordon. The Court of Appeals affirmed.

Reasons for Granting the Writ

This case involves a novel and important question under the Bankruptcy Act. Prior to the 1938 Amendment of the Bankruptcy Act, a creditor could appear and plead in a bankruptcy case. This right was taken away by the Amendment. 11 U.S.C. 41(b). Thus, Gordon, the petitioner in this Court, did not participate in the bankruptcy proceeding in any meaningful way.

The Bankruptcy Act provides that three creditors must join in an involuntary petition against an alleged bankrupt, unless the number of the creditors of the alleged bankrupt is less than twelve. 11 U.S.C. 95(b). It has been held that the requirement that three creditors join the petition is jurisdictional and that a fraudulent allegation in a bankruptcy petition that there are less than twelve creditors is a jurisdictional defect. *Myron M. Navison Shoe Co., Inc.* v. *Lane Shoe Company*, 36 F.2d 454; *In re Crofoot, Nielsen & Co.*, 313 F.2d 170. .

In this case, a single creditor waited until the last day on which the alleged preference could be avoided to file a bankruptcy petition. The creditor fraudulently imposed himself on the Court by alleging, contrary to his knowledge, that the alleged bankrupt had less than twelve creditors. Gordon, whose property rights were vitally affected by the filing of the fraudulent petition, could not raise the jurisdictional issue in the bankruptcy case because he had no standing. The judgment of the Court of Appeals pre-

cluded him from raising the jurisdictional issue in the trustees's plenary suit when his own property rights were at stake. This is most unfair.

This Court should grant the writ of certiorari so that the jurisdictional implications of Section 59b of the Bankruptcy Act, 11 U.S.C. 95(b) may be determined.

Conclusion

The jurisdictional implication of Section 59b of the Bankruptcy Act, 11 U.S.C. 95(b) is an important question of Federal Law which has not been but should be decided by the Court. For this reason, the writ of certiorari should be granted.

Respectfully submitted,

GEORGE R. DESMOND
24 Union Avenue
Framingham, Massachusetts
and

HENRY FRIEDMAN
31 Milk Street
Boston, Massachusetts
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7386.

SHEPARD A. SPUNT,
PETITIONER, APPELLEE,
v.
ROBERT G. GORDON,
RESPONDENT, APPELLANT.

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

OPINION OF THE COURT

November 10, 1969

Per Curiam. On August 24, 1967, at 2:10 p.m. a single creditor, alleging that there were less than 12 creditors in all, see Section 59(b) of the Act, 11 U.S.C. § 95(b), presented, and filed with leave of court, a petition seeking an adjudication in bankruptcy of one McCullough. McCullough was duly adjudicated and a trustee, Spunt, was appointed. Some months later the trustee sued Gordon to recover an alleged preference received on April 24, 1967. Gordon now appeals from a decision against him on the merits. His complaints do not go to the merits, but are, (1) that a local rule required petition in bankruptcy to be filed before 2:00 p.m., from which he apparently argues that the filing was not effective until the next day, viz., one day after the four months limitation; and (2) that Section 59(b)'s authorization that one creditor, rather than three, may file in certain cases, is a jurisdictional requirement, subjecting the adjudication to collateral attack.

(1). The local rule as to filing must be construed as directory, only. The claim that its waiver by the court was invalid, so that as matter of law the petition must be regarded as filed too late, is totally frivolous. *Cf. Casalduc* v. *Diaz,* 1 Cir., 1942, 117 F.2d 915.

(2). Appellant's second contention is little better. He concedes, as he must, that the mere fact that there were more than 12 creditors does not render the petition invalid. Such circumstances would have been material only on proof of an additional matter, fraud or recklessness on the part of the petitioning creditor. *In re Security Motor Co.*, W.D. Mo., 1943, 51 F.Supp. 559. The state of mind of the creditor, however much as it may be a defense available in the proceeding itself, does not go to the basic jurisdiction of the court so as to permit collateral attack. Appellant's cases are not in point.

Affirmed

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7386.

SHEPARD A. SPUNT,
PETITIONER, APPELLEE,
v.
ROBERT A. GORDON,
RESPONDENT, APPELLANT.

JUDGMENT
Entered November 10, 1969

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed.

Enter:

(s) ALDRICH, Ch. J.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

[cc: Messrs. Friedman and Newman.]

APPENDIX C

MEMORANDUM OF DECISION
(Order entered December 5, 1968)

MURRAY, D.J. This is an action brought under sections 60b and 67d(2)(a) of the Bankruptcy Act, 11 U.S.C. §§ 96 (b), 107(d)(2)(a), to set aside a voidable preference, or, in the alternative, to set aside the Bankruptcy Act's version of a fraudulent conveyance. This court has subject-matter jurisdiction under sections 60b and 67e of the Bankruptcy Act.

Now pending before the court is respondent's motion to dismiss the complaint. In addition, there are two separate motions by petitioner to amend his complaint. No oppositions to the latter two motions have been filed, and they have been granted.

The motion to dismiss has been briefed by both parties. The questions presented by the motion are:

(1) Would an intentionally false allegation in an involuntary bankruptcy petition concerning the right of petitioner here to bring that petition compel dismissal of this action?

(2) Does the filing of a bankruptcy petition pursuant to court order but after the time of day permitted by a local rule of this court compel dismissal of this action?

(3) Did the alleged preference occur within four months from the time the involuntary bankruptcy petition was filed?

Turning to question (1), respondent has requested a hearing for the purpose of examining petitioner to determine whether he knew there were twelve or more creditors of the bankrupt at the time he filed the bankruptcy petition. According to the respondent, the petition filed by the trustee-petitioner alleged that there were less than twelve

creditors. Section 59b of the Bankruptcy Act, 11 U.S.C. § 95(b), provides that three creditors must join in filing an involuntary bankruptcy petition when there are less than twelve creditors. If there are less than twelve creditors, one creditor may file the petition. Apparently the petition involved here was filed and signed solely by the petitioner acting in a representative capacity for one of the bankrupt's creditors.

Assuming that at a hearing the respondent could show that the allegation concerning the number of creditors was known to be false when made, the question is whether this fact should have any affect on the proceedings here. The complaint alleges that the debtor has already been adjudicated a bankrupt, so that matter is not before the court. It would seem that any objection to the verity of the allegations in the involuntary bankruptcy petition must, however, be made in the answer to that petition. Section 59d of the Bankruptcy Act, 11 U.S.C. § 95(d), provides as follows:

> If it be averred in the petition that the creditors of the bankrupt, computed as provided in subdivision e of this section, are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses and a brief statement of the nature of their claims and the amounts thereof, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that the parties in interest shall have an opportunity to be heard. If upon such hearing it shall appear that a sufficient number of qualified creditors have joined in such petition or, if prior to or during such hearing, a sufficient number of qualified creditors

shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

Alternatively, the court finds that a creditor has no standing to object to the truth of allegations in the petition. While a creditor may at any time join in a bankruptcy petition (Bankruptcy Act § 59f, 11 U.S.C. § 95(f)), creditors are not entitled to appear and plead in opposition to the petition. Bankruptcy Act § 18b, 11 U.S.C. § 41(b). This was a change brought about by a 1938 amendment to the Act, which deleted creditors as persons entitled to object to the filing of an involuntary petition. The House Report explaining this change reads as follows:

> The right of creditors to file an answer and oppose the petition has been eliminated in the amendment of Section 18b, and Section 59f has been changed to correspond with this amendment. A creditor should not be permitted to oppose an adjudication; invariably, the motive of such a creditor is to protect a preference or to retain some other undue advantage at the expense of the other creditors, contrary to the fundamental purpose of the act — an equitable distribution among all creditors.

H.R. Rep. No. 1409, 75th Cong., 1st Sess. 17 (1937). It would seem that if creditors are not entitled to object to the allegations in an involuntary petition when it is filed, they should have no right to object after the debtor has been adjudicated a bankrupt.

The case cited by respondent in support of his motion to dismiss on this ground, *Myron M. Navison Shoe Co.* v. *Lane Shoe Co.*, 36 F. 2d 454 (1st Cir. 1929), is inapposite for at least two reasons. First, the case was decided prior to the 1938 amendment to the Bankruptcy Act discussed above. Second, the objection to the allegation concerning the number of creditors was made in the answer to the involuntary petition, not in a subsequent proceeding.

As a second reason for dismissing the action, respondent argues that a district judge lacks authority to depart from the local rules of this court, that the order of the judge here permitting filing of the involuntary petition after the time specified in the local rule was such a departure, and that therefore the bankruptcy court had no "jurisdiction" to adjudicate the debtor a bankrupt. Alternatively, respondent argues that the allowance of the filing of this bankruptcy petition by the judge "after 2 p.m. on August 24, 1967, prejudiced the rights of the defendant in violation of the general principles of equity in the Constitution of the United States".

The latter argument has no merit, and the former may be briefly disposed of. Relevant is the following passage from the order permitting late filing:

> The creditor's petition herein was presented to the Clerk for filing at 2:10 p.m. today and the question has arisen whether it may be accepted for filing in view of local Bankruptcy Rule 1 . . . . The local rule provided . . . that bankruptcy petitions will not be received or filed . . . after 2:00 o'clock in the afternoon during the months of July and August. Counsel for the petitioner has represented to the Deputy Clerk that today is the last day on which a petition may be filed if an alleged preference is to be avoided. The practice of early closing during the summer months, which was in effect in 1941 and in 1950 when local Bankruptcy Rule 1 was promulgated, is no longer observed in the Clerk's office. This practice was abandoned by the Clerk last year. Currently the office of the Clerk is open during July and August the same hours as it is during the rest of the year.
>
> Under the circumstances, I have considered the question as an emergency matter. Because the Clerk's office no longer observes a period of early closing

> during the summer months, and on the basis of counsel's representation regarding an alleged preferential transfer . . . which may not be attacked after the expiration of four months, I consider that an exception to Local Rule 1 is warranted in this case. Accordingly, it is ORDERED that the creditor's petition may be received and filed by the Clerk today.

Assuming but not deciding,[1] that the judge erred in permitting late filing, that error would not deprive the bankruptcy court of jurisdiction. As was said in *Giannini, supra* note 1, a district judge "has power to act in disregard of . . . [the local rule], for he has jurisdiction to make erroneous as well as lawful orders, and it matters not whether the error consist in violating a rule of court, or disregarding a statutory provision not relating to jurisdiction, or misapplying a general legal principle". Absent a jurisdictional defect in the adjudication of the debtor as a bankrupt, any error made in applying a local rule in that proceeding is of no consequence here.

The third question is whether the bankruptcy petition was filed within four months of the alleged preference. The alleged preference was created on April 24, 1967 at 3:55 p.m. In his brief, respondent states that the petition was filed after 3:55 p.m. on August 24, 1967. The Bankruptcy Act has a section dealing with computation of time. It reads as follows:

> Whenever time is enumerated by days in this Act, or in any proceeding thereunder the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a holiday.

---

[1] *See In re G. W. Giannini, Inc.*, 90 F. 2d 445, 447-48 (2d Cir. 1937) (rule involved in instant case would probably be considered directory, rather than mandatory, by *Giannini* court, thus justifying its abrogation under compelling circumstances by district judge).

Bankruptcy Act § 31, 11 U.S.C. § 54. Courts have held that this section is applicable in the computation of periods of time expressed in months or years in the Bankruptcy Act. *See In re Hamilton*, 29 F. 2d 281 (7th Cir. 1928); *In re Effenson*, 88 F. Supp. 261 (D. Mass. 1950); *see also Henkin* v. *Rockover Bros., Inc.*, 259 F. Supp. 202, 204-05 (S.D.N.Y. 1966). At least one case indicates that filing at any time on the last full day of another four-month period in the Bankruptcy Act is permissible. *See In re Tonawanda St. Planing Mill Co.*, 6 Am. Bankr. R. 38 (W.D. N.Y. 1901) (construing requirement that petition be filed not later than four months after act of bankruptcy involved. Respondent, however, cites another decision, *In re Ledbetter*, 267 F. 893 (N.D. Ga. 1920), which he claims stands for the contrary proposition. In *Ledbetter* a suit was instituted in the forenoon, and, at 5:30 p.m. of the same day, a voluntary bankruptcy petition was filed. The secured creditor who filed the suit claimed costs and attorney's fees incurred before the filing of the bankruptcy petition. The court found that the trustee's ability to defeat the creditor's claim depended on whether a fraction of a day could be disregarded so as to relate the filing of the bankruptcy petition back to the first moment of the day when the creditor's suit was instituted. It held that "where one day only is involved, and the rights of litigants depend on priority in time of two occurrences on that day, and the priority can be established the courts will ascertain and regard the actual priority. There is only a presumption that they occurred at the same time." 267 F. at 895-96.

The question before the *Ledbetter* court was, of course, different from the question presented here. In this case the court is not confronted with a priority question concerning two events occurring on the same day; rather, the question here is whether the court will attach any significance to the fact that an event taking place on the last

day of a statutory four-month period occurred at a later time of day than the event which started the running of the four-month period. In dictum, the *Ledbetter* court answered this question in the negative, noting that:

> Section 31 of the Bankruptcy Act . . . declaring that in such a case the first day is excluded and the last to be counted, fairly implies that fractions are to be disregarded.

Id. at 895. Since the Act excludes the first day in computing the four-month period, it follows that the time of day at which an alleged voidable preference occurred is irrelevant for the purpose of computing that period. Or, if the four-month period is computed by counting backward from the date the petition was filed, so that the date on which the petition was filed is considered the first day (*see In re Hamilton*, 29 F. 2d 281 (7th Cir. 1928)), the time of day at which the petition was filed is similarly irrelevant.

The *Ledbetter* court also stated that fractions were there observed to avoid "unjust retroaction" (*id.* at 896), which would occur if fractions were disregarded, because to do so would defeat a secured creditor's claim arising before the filing of the bankruptcy petition. There is no "unjust retroaction" in disregarding a fraction here, however, because the respondent creditor could not rely on the time of filing of a bankruptcy petition against its debtor when it recorded its alleged preference.

(s) FRANK J. MURRAY
United States District Judge

Filed December 17, 1968

APPENDIX D

MEMORANDUM AND ORDER

March 31, 1969

MURRAY, D. J. This is an action brought under sections 60b and 67d (2)(a) of the Bankruptcy Act, 11 U.S.C. §§ 96(b), 107(d)(2)(a), to set aside a transfer of realty in Sudbury, Massachusetts, on the ground that such transfer was a voidable preference or a fraudulent conveyance. At the trial evidence was introduced without objection relevant to the question whether transfers of realty in Merrimac, Massachusetts, and Dracut, Massachusetts, were also voidable preferences or fraudulent conveyances. Although no claim involving the Merrimac and Dracut parcels was made in the complaint, as amended, the question whether transfers of these parcels constituted voidable preferences or fraudulent conveyances is properly before the court. See Fed. R. Civ. P. 15(b), applicable to this proceeding by virtue of Order 37 of the General Orders in Bankruptcy and Fed. R. Civ. P. 81(a)(1). This memorandum of decision incorporates the court's findings of fact and conclusions of law. See Fed. R. Civ. P. 52(a).

Defendant Robert Gordon has stipulated that one Maurice Gordon is the real party in interest and that the conduct of Maurice Gordon binds him. Accordingly, defendant will be referred to herein as "Gordon", and no distinction will be drawn between Robert and Maurice Gordon for any purpose.

On May 25, 1965, John J. McCullough (bankrupt) made and delivered to Gordon a promissory note for $112,000, payable December 25, 1965, for which bankrupt received $90,000. Bankrupt owned all of the stock of American Capital Corporation, a licensed Small Business investment company, which he pledged to Gordon as collateral for the loan. There was no other security for the loan. The

note was not paid when it fell due, and no payments were made on the loan until January 1966, when bankrupt paid Gordon $26,000. In September 1966 bankrupt gave Gordon a check for $2,000 as payment of interest due on the loan, but the check was returned by the drawee for insufficient funds, and no part of the check was collected by Gordon.

Gordon brought an action against bankrupt in Superior Court for Suffolk County, Commonwealth of Massachusetts, by writ dated January 9, 1967, and an attachment (see Mass. Gen. Laws ch. 223, §§ 62, 67) was made on January 11, 1967 by virtue of the writ of certain real estate allegedly owned by bankrupt in Sudbury standing in the name of Joseph H. McCullough, bankrupt's brother. Bankrupt had no ownership interest in Sudbury real estate when the attachment was made on January 11, 1967. A copy of the writ with the officer's return relating to the attachment was filed with Middlesex County Registry of Deeds on January 11, 1967. See Mass. Gen. Laws ch. 223, §§ 62-63, 66-67. The declaration, filed on March 6, 1967, the return day of the writ, in Count I was a claim for $70,000, allegedly the balance due on the May 1965 note, and, in Count II, was a claim for $2,000 on the unpaid check.

Prior to the commencement of that action, the Small Business Administration initiated receivership proceedings against American Capital Corporation. On November 29, 1966 papers relating to those proceedings were served on American Capital Corporation. Francis H. White, an attorney, represented the bankrupt in early 1967. At that time he was present with the bankrupt at a conference in Gordon's office. There was some discussion concerning the American Capital Corporation stock, the collateral for the March 1965 loan to the bankrupt. Gordon indicated that he did not feel secure and was concerned about the value of the stock as collateral. In early March 1967, an

attorney named Skinner, who represented Gordon, visited Henry J. Cataldo, area counsel of the Small Business Administration. Skinner told Cataldo that it was the intention of his client to liquidate his security interest in the American Capital Corporation stock.

On February 11, 1967, Joseph H. McCullough, brother of bankrupt, quitclaimed two parcels of land owned by him in Sudbury to bankrupt, in exchange for the promise of bankrupt to pay him $75,000 for this land. A comparison of the two quitclaim deeds executed by Joseph H. McCullough with the property described in the sheriff's return on Gordon's special attachment does not indicate clearly whether the attachment purported to reach both quitclaimed parcels or only one of them.

On April 21, 1967 bankrupt and his wife made a note for $70,000 payable to Gordon in 90 days. The note was secured by pledge of the same American Capital Corporation stock which secured the May 1965 note, by mortgages on the above-described Sudbury parcels, and by mortgages on land in Dracut and Merrimac. The fair saleable value of the bankrupt's equity interest in all these parcels, prior to the execution of the mortgages, was $90,000 to $100,000. Bankrupt had no other assets at this time, and Gordon had reasonable cause to believe bankrupt had no other assets. Bankrupt's May 1965 note was returned to him as part of the transaction.

The quitclaim deeds to the Sudbury parcels executed on February 11, 1967 were recorded April 24, 1967. All the mortgages given by the bankrupt on April 21 — the transfers complained of here — were also recorded on April 24.

On August 24, 1967 an involuntary bankruptcy petition was filed against bankrupt. He filed a schedule of unsecured claims in the amount of $128,343.36. The schedule did not include unsecured claims of $187,500. The $75,000

debt owing bankrupt's brother for parcels of land in Sudbury was one of the unscheduled claims. An adjudication of bankruptcy followed.

Turning to the claim that the transfers on April 24, 1967 constituted voidable preferences, the trustee must prove the following:

(1) the transfers occurred within four months of the filing of the bankruptcy petition;
(2) the mortgages were "for or on account of an antecedent debt";
(3) bankrupt was insolvent when he made the transfers on April 24, 1967;
(4) Gordon or his agent had, at the time of the transfers, "reasonable cause to believe that . . . [bankrupt was] insolvent"; and
(5) the mortgages enabled Gordon to obtain a greater percentage of his debt than some other creditor of the same class.

See Bankruptcy Act §§ 60a(1), 60b; 11 U.S.C. §§ 96(a)(1), 96(b). A prior opinion filed by this court in this case held that the transfers occurred within four months of the filing of the bankruptcy petition. There is no need to reconsider that determination. It is undisputed that these transfers were "for or on account of an antecedent debt" within the meaning of section 60a(1) of the Bankruptcy Act, 11 U.S.C. § 96(a)(1).[1] The antecedent debt was the

[1] If the form of the transactions on April 21, 1967 were to be strictly observed by the court and by the parties, perhaps the contention might have been made that the transfer subject to attack by the trustee was not the giving of the mortgages but the payment of the 1965 note. Both parties, however, have never deviated from the view that the transfers challenged as voidable preferences or fraudulent conveyances involved the giving of mortgages. This is in substance what occurred. Despite the making of a new note and the return of the May 1965 note, the mortgages essentially gave Gordon additional security on a $70,000 obligation. Thus the court finds they were given "for or on account of an antecedent debt" as the term "antece-

bankrupt's May 1965 note. The other elements of the trustee's case, however, require more attention.

To support the claim that the bankrupt was insolvent on April 24, 1967, there is evidence showing the bankrupt incurred a $75,000 debt to his brother on February 11, 1967. That debt was not paid at the time the involuntary petition was filed against the bankrupt. There is no evidence to show when bankrupt's other scheduled and unscheduled debts were incurred. However, at the time of the transfer, bankrupt owed Gordon $70,000 on the May 1965 note. Unlike a fraudulent conveyance under sections 67d(2)(a), 67d(1)(d) of the Bankruptcy Act, 11 U.S.C. §§ 107(d)(2)(a), 107(d)(1)(d), a voidable preference can only be established if the bankrupt is insolvent at the time of the transfer. Bankruptcy Act § 60a(1), 11 U.S.C. § 60(a)(1); see 1 Collier on Bankruptcy para. 1.19[2.1] at 109 (14th ed. 1968). The value of the property transferred must be included in the bankrupt's assets for the purpose of determining whether he was insolvent at the time of the transfer. Bankrupt's interest in the mortgaged parcels had a value of from $90,000 to $100,000. His only other asset was the pledged American Capital Corporation stock. On the evidence introduced in this case, the court must conclude that the pledged stock, even free of Gordon's security interest, had little, if any, value. There is no evidence to show any change in bankrupt's financial condition between April 21, 1967, the date the mortgages were executed, and April 24, 1967, the date the mortgages were recorded and the effective date of the transfer under section 60a(2) of the Bankruptcy Act, 11 U.S.C. § 96(a)(2). Thus the "aggregate of . . . [bankrupt's] property" on April 24, 1967 was not "sufficient in amount to pay his debts" and he was insolvent on that date within the meaning of section 1(19) of the Bankruptcy Act, 11

---

dent debt" is used in both section 60a(1) of the Bankruptcy Act, 11 U.S.C. § 96(a)(1), and section 67d(1)(e)(2) of the Bankruptcy Act, 11 U.S.C. § 107(d)(1)(e)(2).

U.S.C. § 1(19). (For the purpose of the discussion below concerning whether these transfers were fraudulent conveyances, a finding of insolvency is also warranted under Bankruptcy Act § 67d(1)(d), 11 U.S.C. § 107(d)(1)(d).)

The court also finds that Gordon had "reasonable cause to believe that . . . [bankrupt was] insolvent" on April 24, 1967 within the meaning of section 60b of the Bankruptcy Act, 11 U.S.C. § 96(b). Throughout his dealings with bankrupt, Gordon was an experienced, shrewd businessman. He had large holdings of real estate which he operated and managed. He was also in the business of loaning money. The only purpose of the suit in January 1967 was to reach the real estate in Sudbury in which Gordon believed bankrupt had an interest. Gordon did not feel secure with only the American Capital stock as collateral [Gordon expected that the Sudbury parcels, which he believed he controlled by the attachment,[2] would stand as additional collateral for the loan. When he learned, as indeed he must have learned in his talks with bankrupt, that bankrupt had (no beneficial interest) in the Sudbury land and that his attachment caught nothing, he sought to have it made collateral for the loan.] There can be no other reasonable explanation for bankrupt and Joseph McCullough engaging in the transaction whereby Joseph deeded the two Sudbury parcels to bankrupt. There is no evidence that the parcels were improved or that any income was being derived therefrom, or that bankrupt had any plans to develop the land or to put the parcels to any use whatever. When Gordon brought suit in January 1967, he knew bankrupt had paid only $26,-

[2] As noted above, it is not clear whether the attachment purported to reach one of the Sudbury parcels or both of them. In his trial brief, Gordon asserts that only one of the parcels was described in the sheriff's return. The court's ultimate findings in favor of the trustee remove the necessity for resolving this question. For convenience, the attachment will be treated as if it attempted to reach both Sudbury parcels.

000 on his May 1965 debt of $112,000, which then was more than a year overdue, and that in September 1966 bankrupt had given him a check for $2,000 which was dishonored because of insufficient funds in bankrupt's account with the drawee. Viewed in this context, the whole purpose of the transactions on April 21, 1967 was to provide additional, reliable security for bankrupt's obligation to Gordon. It is apparent that, on April 24, 1967, Gordon had "reasonable cause to believe that . . . [bankrupt was] insolvent".

The last question on the voidable preference claim is whether these transfers enabled Gordon "to obtain a greater percentage of his debt than some other creditor of the same class". Bankruptcy Act § 60a(1); 11 U.S.C. § 96 (a)(1). Relying on *Hanford* v. *Codman*, 226 Mass. 93 (1929), Gordon argues that substituting the mortgage on the Sudbury property for the attachment of January 11, 1967 took nothing away from bankrupt's other unsecured creditors within four months of the filing of the petition. This argument suffers from the infirmity that on January 11, 1967, [the date of the attachment, bankrupt had no interest in the Sudbury parcels standing in the name of his brother.] Thus the purported special attachment under Mass. Gen. Laws ch. 223, § 67 was ineffective, and that part of the writ directing seizure of the bankrupt's property (see Mass. Gen. Laws ch. 223, § 62) did not, of course, reach bankrupt's after-acquired interest in the Sudbury parcels.

The court also finds that these transfers did not constitute fraudulent conveyances. Bankrupt granted security interests in land having a total value of from $90,000 to $100,000. The value of the pledged stock was negligible. In return, bankrupt gained the further use of $70,000 for 90 days at an interest rate of one and one-half percent per month. The value of the antecedent debt [3] secured by the mortgages was

[3] See note 1 *supra*.

not "disproportionately small as compared with the value of the property or obligation obtained". Bankruptcy Act § 67d(1)(e)(2); 11 U.S.C. § 107(d)(1)(e)(2). Thus these transfers were made for a "fair consideration" within the meaning of section 67d(2)(a) of the Bankruptcy Act, 11 U.S.C. § 107(d)(2)(a), and so cannot be considered fraudulent conveyances within the meaning of that section.

The trustee is entitled to judgment on the finding that the transfers were voidable preferences. Plaintiff shall within 15 calendar days from the date thereof prepare a proposed order or decree in accordance with this memorandum for submission to the court for entry, with copy to defendant.

(s) F. J. MURRAY
United States District Judge

March 31, 1969

SUPPLEMENTAL MEMORANDUM AMENDING FINDINGS AND CONCLUSIONS OF THE COURT'S MEMORANDUM AND ORDER OF MARCH 31, 1969

1. Page 4, lines 11-13 are amended to read as follows:
   The mortgages given by the bankrupt on April 21 — the transfers complained of here — were recorded on April 24, 1967 (Sudbury), May 1, 1967 (Merrimac), and May 4, 1967 (Dracut).
2. Page 4, lines 28-29 are amended to read as follows:
   (3) bankrupt was insolvent when he made the transfers on April 24, 1967, May 1, 1967, and May 4, 1967;
3. Page 5, line 7 is amended to read as follows:
   Sudbury transfer occurred within four months of the filing of the
4. Page 6, lines 8-10 are amended to read as follows:
   1967, the date the mortgages were executed, and May 4, 1967, the most recent date on which a mortgage was recorded and the effective date of the most recent

transfer under section 60a(2) of the Bankruptcy Act,

5. Page 6, line 12 is amended to read as follows:

property'' on April 24, 1967, May 1, 1967, and May 4, 1967 was not ''sufficient in amount to

meaning of section 67d(2)(a) of the Bankruptcy Act, 11 U.S.C. § 107(d)(2)(a), and so cannot be considered fraudulent conveyances within the meaning of that section.

The trustee is entitled to judgment on the finding that the transfers were voidable preferences. Plaintiff shall within 15 calendar days from the date thereof prepare a proposed order or decree in accordance with this memorandum for submission to the court for entry, with copy to defendant.

(s) F. J. MURRAY
United States District Judge

March 31, 1969

APPENDIX E

DECREE
May 15, 1969

MURRAY, D. J.

This action came on for trial before the court on December 30, 1968, and, after trial of the case on the merits, this court on March 31, 1969 having found as voidable preferential transfers the three mortgages dated April 21, 1967 given by John J. McCullough, Bankrupt, to the Respondent, Robert G. Gordon, one recorded April 24, 1967 in the Middlesex County South District Registry of Deeds Book 11313 page 736, one recorded May 4, 1967 in the Middlesex County North District Registry of Deeds Book 1793 page 450, and one recorded May 1, 1967 in the Essex County South District Registry of Deeds Book 5439 page 398, and, after hearing, the Respondent having no objection to the form of this decree:

IT IS HEREBY DECREED:

1. That the Respondent Robert G. Gordon shall, within thirty-one days after entry of this Decree, discharge in the manner provided by law the three mortgages described above.

2. That the Petitioner recover costs to be assessed by the clerk.

(s) F. J. MURRAY
United States District Judge

LIBRARY
UPREME COURT, U. S.

JAN 17 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

1018

ROBERT G. GORDON,
PETITIONER,

v.

SHEPARD A. SPUNT,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAMUEL NEWMAN
131 State Street
Boston, Massachusetts
Attorney for Respondent

Blanchard Press, Inc., Boston, Mass. — Law Printers

INDEX

	Page
Opinions Below	1
Statutes Involved	2
Statement	3
Counter Statement of Questions Presented	4
Argument	4
I. When a Petition in Bankruptcy is proper on its face the Court has jurisdiction	4
II. Only the Alleged Bankrupt may oppose an involuntary petition in Bankruptcy	7
III. An adjudication in bankruptcy cannot be attacked in a collateral proceeding	9
IV. Gordon is not an aggrieved or interested party in the original petition in Bankruptcy Filed against John J. McCullough	11
Reasons for Denying the Writ	12
Conclusion	13

Table of Authorities

Cases

Abramson v. *Boedeker,* 379 F.2d 741, 746 (C.C.A. 5th, 1967)	10, 12
Binderup v. *Pathe Exchange,* 263 U.S. 291	6
In re Carden, 45 *A.B.R. (N.S.)* 258, 118 F.2d 677, 679 (C.C.A. 2nd, 1941)	7
Citizens National Bank of Lublock v. *Spear,* 292 F.2d 491 (C.C.A. 5th, 1953)	11, 12
Commercial Credit Corporation v. *Skutt,* 341 F.2d 177, 181 (C.C.A. 8th, 1965)	5, 8
In re First National Bank of Belle Fourche, 18 A.B.R. 265, 152 Fed. 64 (C.C.A. 8th, 1907)	10

Page

In re National Republic Co., 42 A.B.R. (N.S.) 132, 109 F.2d 167 (C.C.A. 7th, 1940) 7, 10

In re Plymouth Cordage Co., 13 A.B.R. 655, 135 Fed. 1000 (C.C.A. 8th) 6

Providence Box & Lumber Co. v. *Goodrich Daniels Lumber Corp.*, (D. Vt. 1948) 80 F. Supp. 61, 62 5

In re Security Motors Co., (D.C. W.D., Mo. 1943) 54 A.B.R. (N.S.) 521, 51 F. Supp. 559, 560 6

In re Sterling, 48 A.B.R. (N.S.) 468, 125 F.2d 104 (C.C.A. 9th, 1942) 10

Wynne v. *Rochelle*, 385 F.2d 789, 799 (C.C.A. 5th, 1967) 10

Statutes

Section 1 (2) of the Bankruptcy Act 2, 9

Section 18b of the Bankduptcy Act 2, 7, 9, 10, 12

Section 59b of the Bankruptcy Act 2

Section 59d of the Bankruptcy Act 2, 3, 12

Section 59f of the Bankruptcy Act 2, 3, 7, 9

Section 95 of the Bankruptcy Act 2

Section 18b of the 1898 Bankruptcy Act 2

Section 59 of the 1898 Bankruptcy Act 2

Textbooks

Collier on Bankruptcy 14th Edition Volume 2 p. 18 7

p. 181 9

In the
Supreme Court of the United States

OCTOBER TERM, 1969

ROBERT G. GORDON,
PETITIONER,

v.

SHEPARD A. SPUNT,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review a final judgment of the United States Court of Appeals for the First Circuit entered November 10, 1969 which in a per curiam decision upheld the judgment of the District Court Judge directing that the Petitioner return to the Trustee in Bankruptcy preferential transfers.

Opinions Below

The opinions of the Courts below are adequate set forth in the petition.

Statutes Involved

This case involves Section 1 (2) of the Bankruptcy Act, Section 18b of the Bankruptcy Act; Section 59b of the Bankruptcy Act, Section 59d of the Bankruptcy Act and Section 59f of the Bankruptcy Act.

> "*Section 1(2)* — "Adjudication" shall mean a determination, whether by decree or by operation of law, that a person is a bankrupt."
> "*Section 18b* — The Bankrupt and, in the case of a petition against a partnership, any general partner or, in the case of a petition in behalf of a partnership, any general partner not joining therein, may appear and plead to the petition within five days after the return day or within such further time as the court may allow."

> "*Section 59b* — Three or more creditors who have provable claims not contingent as to liability against a person, amounting in the aggregate to $500 in excess of the value of any securities held by them, or, if all of the creditors of the person are less than twelve in number, then one or more of the creditors whose claim or claims equal that amount, may file a petition to have him adjudged a bankrupt; but the claim or claims, if unliquidated, shall not be counted in computing the number and the aggregate amount of the claims of the creditors joining in the petition, if the court determines that the claim or claims cannot be readily determined or estimated to be sufficient, together with the claims of the other creditors, to aggregate $500, without unduly delaying the decision upon the adjudication."

Section 59d — If it be averred in the petition that the creditors of the bankrupt, computed as provided in subdivision e of this section, are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses and a brief statement of the nature of their claim and the amounts thereof, and thereupon the Court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that the parties in interest shall have an opportunity to be heard. If upon such hearing it shall appear that a sufficient number of qualified creditors have joined in such petition, or if prior to or during such hearing, a sufficient number of qualified creditors shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."

"*Section 59f* — Creditors other than original petitioners may at any time enter their appearance and join in the petition."

Statement

On August 24, 1967 at 2:10 p.m. a creditor's petition in bankruptcy against John J. McCullough was presented to the Clerk of the District Court for filing and thereafter, on the same afternoon, pursuant to an Order of the District Court Judge, said petition was accepted for filing by the Clerk. The act of bankruptcy alleged was a preferential transfer to the petitioner on April 24, 1967. In due course McCullough was adjudicated a bankrupt and a trustee in bankruptcy was appointed. Thereafter the trus-

tee in bankruptcy filed a complaint in the United States District Court for the avoidance and recovery of the preferential transfer to the Petitioner. In said proceeding the Petitioner filed a motion to dismiss alleging that the preferenial transfer did not occur within four months from the date of the filing of the creditor's petition in bankruptcy, and that the petitioning creditor perpetrated a fraud when he alleged to the best of his knowledge that the bankrupt had less than twelve creditors, knowing that this fact was not true.

The District Court Judge denied the Motion to Dismiss in his Memorandum of Decision dated December 5, 1968, Appendix C)

On December 30, 1968 the Trustee's complaint on the preferential transfers was tried on its merits and in his Memorandum and Order dated March 31, 1969 Judge Murray ordered judgment on the finding that the transfers were voidable preferences, (Appendix D). The decree of the District Court was affirmed. (Appendix B).

Counter-Statement of Questions Presented

1. When a petition in bankruptcy is proper on its face has the Court jurisdiction of the parties?
2. Can anyone except the alleged bankrupt oppose an involuntary petition in bankruptcy?
3. May an adjudication in bankruptcy be attacked in a collateral proceeding?
4. Is Gordon, the Petitioner, an aggrieved or interested party in the original petition in bankruptcy filed against John J. McCullough?

Argument

I. When a Petition in Bankruptcy is Proper On Its Face the Court Has Jurisdiction.

The case of *Commercial Credit Corporation* v. *Skutt* 341 F. (2d) 177, 171 (C.C.A. 8th, 1965) is an excellent case which reviews many other decisions decided since the Chandler Amendment of 1938. On the question of jurisdiction, the Court stated the law as follows:

> "A defective petition in bankruptcy presents no different problem from a defective complaint generally. It does not deprive the Court of jurisdiction and is subject to amendment."

In the case of *Providence Box & Lumber Co.* v. *Goodrich Daniels Lumber Corp.* (D. Vt. 1948) 80 F. Supp. 61, 22, the Court stated the following:

> "Another contention is that the Court lacked jurisdiction because there were more than twelve creditors; that less than three signed the original petition and that the Referee erred in allowing other creditors to intervene. This position is clearly untenable.
> If less than three creditors file the petition it must be alleged that the number of creditors are less than twelve. Such an allegation may be made on information and belief since a petitioning creditor could hardly be expected to know such a fact with any great degree of certainty. If in answer to the petition it is asserted that there are in fact twelve or more creditors then section 59 sub. d of the Bankruptcy Act, 11 U.S.C.A. § 95, sub. d, provides the procedure to be followed.
> This section provides that in such a situation the Referee shall delay the hearing for a reasonable time, to the end that the parties in interest shall have an opportunity to be heard. If upon such hearing it shall appear that a sufficient number of qualified creditors have joined in such petition, or, if prior to or during

> such hearing, a sufficient number of qualified creditors shall join therein, the case may be proceeded with, but otherwise it shall be dismissed. . . . Creditors other than the original petitioners may at any time enter their appearance and join in the petition."

It was further stated *In re Security Motors Co.* (D.C. W.D., Mo. 1943) 54 A.B.R. (N.S.) 521, 51 F. Supp. 559, 560 that

> "A careful reading of all of Section 95 (11 U.S.C.A.) shows that it was contemplated by the Congress that a single, qualified petitioning creditor might reasonably be mistaken in an averment that there were less than twelve creditors in order to qualify such petitioner for instituting a bankruptcy proceeding. By paragraph (D) the answer of the alleged bankrupt might disclose a large number of creditors. In such event it was not contemplated that the petition should be dismissed but that the sole creditor might be joined by a sufficient number of other qualified creditors so as to warrant the further proceeding in bankruptcy. . . .
> This is not the usual case of fraud and deceit. No one was deceived by the averment to its disadvantage. The law contemplated that it might not be true and still not justify adverse action against the petitioner. According to the admitted facts the alleged bankrupt is insolvent and, moreover, while insolvent, it committed an act of bankruptcy. It should follow that the creditors had a legal right to compel bankruptcy."

See also *Binderup* v. *Pathe Exchange,* 263 U.S. 291.*In re Plymouth Cordage Co.* 13 A.B.R. 665, 135 Fed. 1000 (C.C.A. 8th) stated:

> "Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy or an insufficient complaint at law, accompanied by proper service upon the defendants, gives jurisdiction to the Court to determine the questions it presents, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the Court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff."

Collier on Bankruptcy, 14th Edition, Volume 2, Page 18. See also *In re National Republic Co.* 42 A.B.R. (N.S.) 132, 109 F. (2d) 167 (C.C.A. 7th, 1940)

The bankruptcy petition on its face alleged all the elements required by the Bankruptcy Act to have McCullough adjudicated a bankrupt and, therefore, the Court had jurisdiction.

II. Only the Alleged Bankrupt May Oppose an Involuntary Petition in Bankruptcy.

In the matter of Carden, 45 A.B.R. (N.S.) 258, 118 F. (2d) 677, 679 (C.C.A., 2d, 1941), cert. denied 314 U.S. 647, 62 S. Ct. 91, 88 L. Ed 519, the Court referred to the deletions made by the Chandler Amendment of 1938 in Section 18B and 59F and said:

> "The old act provided in Sec. 18, sub. b, that the bankrupt or any creditor might appear and plead to the

petition within five days after the return day or within such further time as the Court might allow. In Sec. 18, sub. b of the Chandler Act, this provision was changed by omitting the words "or any creditor". Similarly Sec. 59, sub. f of the old act, 11 U.S.C.A. § 95, sub. f, gave creditors, other than the original petitioners, the right to enter their appearance at any time and join in the petition or file an answer and be heard in opposition to the prayer of the petition. In Sec. 59, sub. f of the Chandler Act, the words 'or file an answer and be heard in opposition' were left out.... Any action under general principles of equity contrary thereto would be contrary to the statute and so erroneous. Consequently, the appellant was without standing to question the sufficiency of the petition."

In the case of *Commercial Credit Corporation* v. *Skutt*, (Supra) at page 179, the Court after reviewing cases which were decided after the 1938 Chandler Amendment stated the law as follows:

"In any event, the appellant as a creditor has no standing to oppose the adjudication of bankruptcy. This has not always been the rule. Under Section 18 Sub. (b) of the Bankruptcy Act of 1898, any creditor could appear and plead to a petition in involuntary bankruptcy. The Congress, however, by adoption of the Bankruptcy Act of 1938 (Chandler Act) rewrote the section of the bankruptcy law and eliminated the right of a creditor to be heard in opposition to an adjudication. (cases cited) This statutory withdrawal of a creditor's right in this particular has been recognized by the text writers as well as the courts."

There is no merit to the argument of the Petitioner that

Gordon, a creditor, may oppose the involuntary petition in bankruptcy against McCullough, as the Chandler Amendment of 1938 specifically prohibits such action by creditors under Section 18B and 59F of the Amendment.

III. An Adjudication in Bankruptcy Cannot Be Attacked in a Collateral Proceeding.

Adjudication is defined in the Bankruptcy Act Section 1 (2) as:

> "A determination, whether by decree or by operation of law, that a person is a bankrupt."

The bankrupt, having failed to contest the verity of the allegations contained in the bankruptcy petition, and having been adjudicated a bankrupt, the adjudication should not be disturbed for the reasons given in Collier on Bankruptcy, 14th Edition, Volume 2, Page 181, where the following is stated:

> "An adjudication of bankruptcy is a judgment in rem, a determination of the debtor's status as a bankrupt, binding upon all whether appearing in the proceeding or not. So far as it declares the status of the debtor, even strangers to the decree may not attack it collaterally. Hence, an adjudication may not be impeached in a collateral proceeding because of defects in pleading appearing on the face of the petition. Similarly, the adjudication may not be questioned collaterally on the ground that the petitioning creditor did not have a valid claim."

Thus, orders of adjudication have been uniformly sustained against collateral attack.

In the case of *First National Bank of Belle Fourche* 18 A.B.R. 26, 12 Fed. 64 (C.C.A. 8th), decided in 1907 prior to the Chandler Amendment of 1938, a creditor sought to overturn the adjudication and the Court said:

> "That judgment, therefore, conclusively estops the complaining creditors here and everywhere from proving the contrary to avoid the adjudication in bankruptcy until the latter is reversed or vacated in some direct proceeding. The adjudication in bankruptcy, in this case, therefore, until reversed or vacated in some direct proceeding, conclusively estopped all the parties to this proceeding, including the petitioning creditors here, from claiming from the record or upon evidence aliunde that the Widell Company was not principally engaged in the manufacturing pursuit and was not rightly adjudicated a bankrupt."

In re National Republic Co. (supra) the Court refused the stockholders and equity receiver the right to contest an involuntary petition against the corporation and cited Section 18B of the Chandler Amendment.

The order adjudicating McCullough a bankrupt is res judicata.

See *In re Sterling* 48 A.B.R. (N.S.) 468, 125 F. (2d) 104 (C.C.A. 9th, 1942)

In the case of *Wynne* v. *Rochelle* 38 F. (2d) 789, 799, (C.C.A. 5th, 1967) it was stated that:

> "It seems clear that under the statute a creditor . . . may not attack an adjudication."

It further reaffirmed the decision in the case of *Abram-*

son v. *Boedecker*, 379 F. (2d) 741, 746 (C.C.A. 5th, 1967) which stated:

> ". . . Since the creditor cannot oppose the petition directly, he ought not to have the right to gain the same benefit through a collateral attack."

It is quite apparent, therefore, that an adjudication in bankruptcy is res judicata and can be attacked only by the bankrupt in a direct proceeding. Furthermore, a creditor has no standing nor right in a collateral proceeding to attack the order of the Court adjudicating McCullough a bankrupt.

IV. Gordon is Not an Aggrieved or Interested Party in the Original Petition in Bankruptcy Filed Against John J. McCullough.

In the case of *Citizens National Bank of Lublock* v. *Spear* 202 F. (2d) 491 (C.C.A. 5th, 1953) the Bank sought to intervene in a bankruptcy proceeding for the purpose of filing a motion to vacate an adjudication. It was said by the Court:

> "The bank's petition shows on its face it is not a party in interest in said proceeding. If interested at all, it is only by virtue of being a preference creditor, or transferee of the bankrupt, whose debt was paid or satisfied prior to the filing of the involuntary petition in bankruptcy.... To be an interested party, the appellant must be affected or aggrieved by the order of adjudication. On the face of the record before us such order does not affect it unless it may be construed as adjudicating the bank to be preference creditor or transferee, and it is not susceptible of any such construction."

The facts in the instant case fall squarely within the case of the *Citizens National Bank of Lublock* v. *Spear* (supra) in which a preference creditor sought by an appeal to vacate an adjudication. The Court said that the Bank was not "an aggrieved or interested party" and denied it standing to contest the adjudication.

Petitioner Gordon is not, and never was, a party "entitled to appear and plead" because sections 18B and 45F of the Bankruptcy Act specifically have eliminated a creditor as a party "entitled to plead to an involuntary petition in bankruptcy."

As stated in *Abramson* v. *Boedeker* (supra) the court said:

> "The creditor cannot oppose the petition directly, he ought not to have the right to gain the same benefit through a collateral attack."

The Petitioner is seeking to retain his preferential transfer by attacking an Act of Congress, which specifically forbids the Petitioner, a creditor, from opposing or answering the original petition in bankruptcy filed against John J. McCullough.

Reasons for Denying the Writ

1. The United States Court of Appeals in its per curiam decision has described the appeal of the Petitioner as "totally frivolous". (Appendix A)

2. Since the 1938 Amendment to the Bankruptcy Act, Section 18B and 59D, certiorari has been uniformly denied to creditors seeking directly or indirectly to attack an

adjudication of a bankrupt, and the Petitioner has cited no case to the contrary.

Conclusion

The Petition for Certiorari should be denied.

Respectfully submitted,

SAMUEL NEWMAN
131 State Street
Boston, Massachusetts
Attorney for Respondent